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DOW, LOHNES & ALBERTSON, PLLC
ATTORNEYS AT LAW

TO-QUYEN T. TRUONG
DIRECT DIAL 202-776-2058
ttruong@dlalaw.com

WASHINGTON, D.C.
1200 NEW HAMPSHIRE AVENUE, N.W. • SUITE 800 • WASHINGTON, D.C. 20036-6802
TELEPHONE 202-776-2000 • FACSIMILE 202-776-2222

ONE RAVINIA DRIVE • SUITE 1600
ATLANTA, GEORGIA 30346-2108
TELEPHONE 770-901-8800
FACSIMILE 770-901-8874

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February 5, 2002

RECEIVED
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY

EX PARTE OR LATE FILED

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Ex Parte* Notification
GN Docket No. 00-185 – Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities

Dear Mr. Caton:

On Monday, February 4, 2002, Alexandra Wilson and the undersigned, counsel for Cox Communications Inc., met with Commissioner Kathleen Abernathy and her legal advisors Matthew Brill and Stacy Robinson regarding the above-referenced proceeding. During the meeting, we discussed Cox's recommendation, set forth in its filings in this proceeding, that governmental authorities should refrain from imposing unnecessary regulations on the provision of cable Internet services and that the Commission should act expeditiously to enforce uniform rules nationwide. In addition, on Tuesday, February 5, 2002, we provided Ms. Robinson and Mr. Brill with copies of the enclosed documents previously filed by Cox in the above-referenced proceeding.

Pursuant to Section 1.1206(b) of the Commission's rules, an original and one copy of this letter and enclosures are being submitted to the Secretary's office for the above-captioned docket and a copy is being provided to Commissioner Abernathy, Ms. Robinson and Mr. Brill. Should there be any questions regarding this filing, please contact the undersigned.

Respectfully submitted,

To-Quyen Truong

cc: Commissioner Kathleen Abernathy
Matthew Brill, Esq.
Stacy Robinson, Esq.

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List ABCDE

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COX ENTERPRISES, INC.
1225 Nineteenth Street, N.W., Suite 450 Washington, D.C. 20036 (202) 296-4933
e-mail: alexandra.wilson@cox.com

Alexandra M. Wilson
Vice President of Public Policy

January 24, 2002

Catherine Bohigian
Legal Advisor to Commissioner Kevin Martin
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Dear Catherine:

Thank you for taking the time to meet with us about the Commission's inquiry concerning high-speed Internet access over cable and other broadband facilities (GN Docket No. 00-185). As Commissioner Martin requested, I am enclosing the additional materials that Cox recently has submitted for the record in that proceeding.

Included in the materials are comments that Cox originally submitted in the Commission's Competitive Networks Inquiry and has since provided to the Cable Bureau staff for inclusion in the broadband access proceeding. As you will see from those comments, Cox does not believe that local governments may lawfully impose additional franchising requirements, nor demand the payment of additional franchise fees, when a franchised cable operator provides non-cable services over its cable network and the provision of those services imposes no additional burden on public rights-of-way. As the comments describe, local governments' interests with respect to non-cable services are limited to managing the physical impact of rights-of-way usage and being compensated for the costs of that management.[1] This is particularly true for interstate communications services, such as interstate information services, over which neither states nor local franchising authorities have substantive jurisdiction. *See* Cox Broadband Access Comments at 41-43.

Cable operators are authorized by local governments to use public rights-of-way through their cable franchises, and they pay for that use through cable franchise fees. As the record in the broadband access proceeding demonstrates, the deployment of high-speed Internet access by cable operators imposes no new burden on public rights-of-way. Local governments thus incur no additional rights-of-way management costs when cable operators provide this new service over their cable networks. Accordingly, even if cable high-speed Internet access were not a cable service,[2] there would be no basis for local

[1] In rare cases, the states have delegated to local governments some of their substantive jurisdiction over intrastate telecommunications services.

[2] As you know, Cox believes that its cable modem services satisfy the statutory definitions of both "cable service" and "information service." *See* Cox's Broadband Access Comments and Broadband Access Reply Comments.

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governments to demand that franchised cable operators secure an additional franchise or pay an additional franchise fee in order to provide this service. (I would also note that, because the deployment of high-speed Internet access imposes no additional rights-of-way costs, local governments' imposition of separate "franchise" or "rights-of-way" fees on this service would constitute an "Internet access tax" and a "discriminatory tax on electronic commerce" prohibited by the Internet Tax Freedom Act.[3])

As Cox observed in its comments in this proceeding, Congress has re-iterated its desire that interstate information services such as Internet access remain "unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2). Congress also specifically empowered the Commission to remove impediments to the deployment of advanced services in Section 706 of the Telecommunications Act of 1996. As the U. S. Supreme Court recently explained in the context of pole attachment rates, allowing cable operators to be charged higher fees when they provide high-speed Internet access, in addition to traditional video services, over their upgraded cable networks "would defeat Congress' general instruction to the FCC to 'encourage the deployment' of broadband Internet capability and, if necessary, 'to accelerate deployment of such capability by removing barriers to infrastructure investment.'"[4]

With respect to our discussion about the implications of a classification decision on broadband service providers' universal service obligations, Cox believes that the Commission has ancillary jurisdiction to address any distortions to the Commission's universal service programs that might arise from classifying cable Internet and other broadband services as Title I "information services." *See* Cox Broadband Access Comments at 43-44. Of course, Cox currently contributes a portion of its revenues from the provision of Title II telephone services to federal and state universal service funds. *See* Cox Broadband Access Reply Comments at 4.

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[3] *See* note following 47 U.S.C. § 151. In addition to the federal requirement that state and local governments manage public rights-of-way for telecommunications carriers in a nondiscriminatory fashion, 47 U.S.C. § 253(c), many state and local authorities have general rights-of-way statutes and ordinances that include a non-discrimination standard. The imposition of separate franchise or rights-of-way fees on cable Internet service would violate these prohibitions on discrimination, because other Internet access service providers are not subject to similar fees.

[4] *Nat'l Cable & Telecomm. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. __., slip op. at 10 (January 16, 2002) (quoting Pub. L. 104-104, VII, §§ 706(a), (b), and (c)(1), 110 Stat. 153, note following 47 U.S.C. § 157 (1994 ed., Supp. V)) .

I hope these materials will be useful to you. Please do not hesitate to contact me should you have further questions.

Sincerely yours,

Sandy Wilson

Alexandra M. Wilson

Enclosures

COX ENTERPRISES, INC.
1225 Nineteenth Street, N.W., Suite 450 Washington, D.C. 20036 (202) 296-4933
e-mail: alex.netchvolodoff@cox.com

Alexander V. Netchvolodoff
Senior Vice President of Public Policy

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STAMP & RETURN

January 9, 2002

VIA HAND DELIVERY

Magalie Roman Salas, Esq.
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Written Ex Parte
GN Docket No. 00-185 – Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities

Dear Ms. Salas:

Cox Communications, Inc. and its subsidiaries ("Cox") respectfully submit this letter to provide further information regarding Cox's cable modem service and cable telephone service, in response to contentions in the above-captioned proceeding regarding these two categories of services. In particular, Earthlink Inc. ("Earthlink") asserts that cable operators cannot provide cable telephone service and cable modem service "under two separate regulatory regimes" – i.e., because cable telephone service is a telecommunications service, cable modem service also must be a telecommunications service.[1] These contentions are contrary to the dictates of the Communications Act.

Congress expressly recognized that a cable operator can engage in different lines of business and can provide simultaneously cable services, telecommunications services and information services over its facilities. As the Fourth Circuit explained in invalidating a local ordinance requiring a cable operator to provide multiple Internet service providers ("ISPs") access to the cable modem platform,

> [T]he Communications Act recognizes that some facilities can be used to provide more than one type of communications service, and it expressly contemplates that these multi-purpose facilities will receive different regulatory treatment depending on which particular service they are being used to provide. . . . Thus,

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[1] Reply Comments of Earthlink, Inc., *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, 1-5 (submitted Jan. 10, 2000) ("Earthlink Reply Comments").

> under the Act, the same facilities can be regulated differently depending on the service they are providing at a given time.[2]

The Communications Act dictates that the Commission determine the regulatory classification of each service independently.[3] Cox therefore complies with the Title VI cable service regulatory framework in providing cable television service and abides by applicable Title II telecommunications service regulatory obligations in providing competitive cable telephone service. As discussed in Cox's prior submissions in this proceeding, the characteristics of cable modem service make it, not a telecommunications service, but both an information service and a cable service subject to Titles I and VI, as defined by the Communications Act.

Cox and other cable operators provision and offer residential cable television service, cable telephone service and cable modem service as separate products.[4] No service is a subset or component of another. Cox's provision of cable modem service does not involve the bundling of an ISP "component" with the cable telephone service, nor merely the conditioning of lines or addition of equipment to the cable telephony platform. Each service offered by Cox is entirely independent in its technology configuration, bandwidth allocation, customer functions and offering to the public.[5]

Cox offers to the public a circuit-switched telephone service that, like plain old telephone service ("POTS") and digital subscriber line ("DSL") service, provides a pure transmission path to transmit any information in any protocol to any destination of the customer's choosing. The customer can send a voice call or facsimile transmission to an individual, a data call to any ISP of the customer's choice to request Internet access service from that ISP, or a data transmission to an office's corporate local area network.[6] Cox's circuit-switched cable telephone service thus

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2 *MediaOne Group, Inc. v. County of Henrico*, 257 F.3d 356, 364 (4th Cir. 2001).

3 As Earthlink stated, "just as 'a cable operator does not lose its identity as a cable operator simply by offering additional types of services, it is equally true that a LEC does not lose its statutorily-defined identity as a local exchange carrier simply by being engaged in other lines of business.'" Earthlink Reply Comments at 1 (footnote omitted). A cable operator does not lose its separate regulatory identity as a cable modem service provider (i.e., a cable service and information service provider) simply by offering a separate local exchange service.

4 Cox also provides private line service to business customers by installing new facilities entirely separate from the cable network, using the business model of competitive local exchange carriers such as the old Teleport Communications Group.

5 Cox uses different parts of the spectrum, different customer premises equipment and different network equipment to provide each of its services.

6 Cox's cable telephone service transmits data at the same narrowband rate as POTS. Current technology and network architecture do not allow high-speed data transmission over the circuit-switched cable telephony platform.

satisfies the definition of a telecommunications service, and Cox fully complies with applicable Title II requirements in the provision of this service.[7]

Cox's cable telephone service is far from being "equivalent" to its cable modem service.[8] Cable modem service does not offer a pure transmission path, but instead provides an enhanced service that integrates high-speed Internet access, content, information and other services. As detailed in Cox's prior submissions, Cox does not and cannot transmit information over the cable modem platform without performing enhanced information service functions. Cox has never offered directly to the public for a fee a pure transmission service over the cable modem platform, as required by the Communications Act telecommunications service definition. Accordingly, Cox's cable modem service is not a telecommunications service, but an information service and a cable service.[9]

We hope that the foregoing discussion will facilitate the Commission's analysis. Please do not hesitate to contact us if we can provide you with additional information.

Respectfully submitted,

Alexander V. Netchvolodoff

cc: W. Kenneth Ferree, Esq.
Sarah Whitesell, Esq.
Royce Sherlock, Esq.
John Berresford, Esq.

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[7] Cox must vastly over-allocate spectrum to the circuit-switched cable telephone service in order to satisfy the common carrier requirements of this lifeline service.

[8] *See* Earthlink Reply Comments at 5.

[9] Moreover, the high bandwidth demands of cable television service and cable telephone service, discussed above, limit the amount of spectrum available for Cox's cable modem service – another factor that prevents Cox from providing unlimited access as a common carrier over the cable modem platform.

HENRY WEISSMANN (State Bar No. 132418)
KELLY M. KLAUS (State Bar No. 161091)
PETER A. DETRE (State Bar No. 182619)
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue, 35th Floor
Los Angeles, CA 90071
Telephone: (213) 683-9100
Facsimile: (213) 687-3702

DAVID J. NOONAN (State Bar No. 55966)
POST KIRBY NOONAN & SWEAT LLP
600 West Broadway, Eleventh Floor
San Diego, California 92101
Telephone: (619) 231-8666
Facsimile: (619) 231-9593

JOHN P. FRANTZ
JOHN THORNE
VERIZON COMMUNICATIONS
1515 North Courthouse Road, Suite 500
Arlington, VA 22209
Telephone: (703) 351-3000
Facsimile: (703) 351-3650

Attorneys for Plaintiff
GTE.NET LLC d/b/a VERIZON INTERNET SOLUTIONS

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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

GTE.NET LLC d/b/a VERIZON INTERNET SOLUTIONS,

Plaintiff,

v.

COX COMMUNICATIONS, INC., a Delaware Corporation, and COXCOM, INC., a Delaware Corporation,

Defendants.

CASE NO. 00-CV-2289-J (BEN)

PLAINTIFF GTE.NET LLC d/b/a VERIZON INTERNET SOLUTIONS' RESPONSE TO DEFENDANT COXCOM, INC.'S FIRST SET OF REQUESTS FOR ADMISSIONS

Pursuant to Rules 26 and 36 of the Federal Rules of Civil Procedure, plaintiff GTE.NET LLC d/b/a Verizon Internet Solutions ("Verizon") hereby answers and, by and through Verizon's undersigned attorneys, objects to Defendant CoxCom, Inc.'s First Set of Requests for Admissions propounded on Verizon dated November 15, 2001 ("Defendant's First Set of Requests for Admissions").

GENERAL OBJECTIONS

1. Verizon's answers and objections set forth herein are based on its current information, understandings and beliefs. Verizon reserves the right to supplement or amend these answers and objections as may become necessary.

2. Verizon objects to Defendant's First Set of Requests for Admissions to the extent it purports to require the disclosure of information subject to the attorney-client or work product privileges or any other applicable privilege or protection. Verizon's answers to Defendant's First Set of Requests for Admissions are without waiver of any such privileges or protections. In the event that privileged or protected information is disclosed inadvertently, such inadvertent disclosure shall not constitute a waiver of such privilege or protection.

3. Verizon objects to Defendant's First Set of Requests for Admissions to the extent that it purports to impose obligations on Verizon beyond the requirements of the Federal Rules of Civil Procedure, otherwise seeks to impose undue burdens on Verizon, or purports to require production of information that is readily available in the public record.

4. Verizon objects to Defendant's First Set of Requests for Admissions to the extent that it purports to require the disclosure of confidential, proprietary, competitive or sensitive information without the entry of a protective order.

ANSWERS AND OBJECTIONS TO SPECIFIC REQUESTS FOR ADMISSIONS

REQUEST FOR ADMISSION NO. 1:

Admit that CCI does not provide Cable Internet Service in California.

RESPONSE TO REQUEST FOR ADMISSION NO. 1:

Pursuant to agreement between counsel, as memorialized in a November 28, 2001 letter from John P. Frantz, Esq. to David E. Mills, Esq., Defendant has agreed to withdraw this

Request for Admission. Accordingly, no objections or responses are required or provided to this Request for Admission.

REQUEST FOR ADMISSION NO. 2:

Admit that CCI does not hold any cable franchise in California.

RESPONSE TO REQUEST FOR ADMISSION NO. 2:

Pursuant to agreement between counsel, as memorialized in a November 28, 2001 letter from John P. Frantz, Esq. to David E. Mills, Esq., Defendant has agreed to withdraw this Request for Admission. Accordingly, no objections or responses are required or provided to this Request for Admission.

REQUEST FOR ADMISSION NO. 3:

Admit that CoxCom offers and provides Cable Internet Service to its residential subscribers only as a single service, including Internet access.

RESPONSE TO REQUEST FOR ADMISSION NO. 3:

Verizon objects to this request because it seeks an admission on a point of fact that reflects the intentions of Cox (as used herein, "Cox" includes both CCI and CoxCom) and is therefore beyond Verizon's personal knowledge. Verizon also objects to this request because it uses terms that are vague and ambiguous, including "offers," "provides," "single service," and "Internet access." Subject to these objections, Verizon denies this request for admission.

From publicly available information and Cox's own admissions, and not from personal knowledge as a seller or purchaser of Cox's Cable Internet Service, Verizon understands that Cox requires its cable Internet customers to access the Internet exclusively through Cox's affiliated Internet service provider. By definition, therefore, Cox does not permit its cable Internet customers to separate the high-speed transmission service that Cox provides from the Internet access service provided by Cox's affiliated ISP.

Notwithstanding the fact that Cox requires its customers to purchase high-speed transmission service from Cox and Internet access from an affiliated ISP as part of a single package, the law is clear that these elements are not a "single service" and are not regulated as a "single service" under the Communications Act. In *AT&T v. City of Portland*, 216 F.3d 871 (9th

Cir. 2000), the Ninth Circuit held that the very same Cable Internet Service provided by Cox "consists of two elements: a 'pipeline' (cable broadband instead of telephone lines) and the Internet service transmitted through that pipeline," *id.* at 878. While the Internet access service provided by Cox's affiliated ISP is "an information service" under the Communications Act, Cox, by providing "its subscribers Internet transmission over its cable broadband facility," is "providing a telecommunications service as defined in the Communications Act." *Id.*

REQUEST FOR ADMISSION NO. 4:

Admit that CoxCom's relationship with Excite@Home is pursuant to a privately negotiated contract.

RESPONSE TO REQUEST FOR ADMISSION NO. 4:

Verizon objects to this request because it seeks an admission on a point of fact that is beyond Verizon's personal knowledge, given that Verizon is not a party to Cox's relationship with Excite@Home and has not had an opportunity to review any contracts between Cox and Excite@Home. Verizon also objects to this request because it uses terms that are vague and ambiguous, including "privately negotiated." Subject to these objections, Verizon denies this request for admission.

Based on publicly available information, and not from personal knowledge as a participant in any contractual relationship with Excite@Home or a participant in Excite@Home's ongoing bankruptcy proceedings, Verizon believes that Cox and Excite@Home have terminated all contractual agreements negotiated prior to Excite@Home's entry into bankruptcy, and that Cox's relationship with Excite@Home is now being conducted pursuant to a new agreement approved by the bankruptcy court on December 11, 2001. Because this agreement was subject to rejection or approval by the bankruptcy court based on the rights of third parties, Verizon does not believe that Cox's relationship with Excite@Home can fairly be characterized as "privately negotiated."

REQUEST FOR ADMISSION NO. 5:

Admit that the FCC consciously chose to grant Cable Internet Service providers freedom from common carrier regulations.

RESPONSE TO REQUEST FOR ADMISSION NO. 5:

Verizon objects to this request because it uses terms that are vague and ambiguous, including "consciously," "chose," "providers," and "freedom." Subject to this objection, Verizon denies the request for admission.

The Federal Communications Commission can take official action relevant to the regulatory status of Cable Internet Service -- and therefore make a conscious choice about the regulatory status of that service -- only through the issuance of orders voted on by a quorum of sitting Commissioners. *See, e.g.*, 47 U.S.C. § 155(c); 47 C.F.R. § 0.5. Speeches by individual commissioners, policy papers issued by FCC bureaus, and Commission press releases do not, and cannot, state the official position of the FCC. *See, e.g., Illinois Citizens Committee For Broadcasting v. FCC*, 515 F.2d 387, 402 (D.C. Cir. 1975) (speech by Commissioner "is not FCC action at all, but merely represents the unofficial expression of the views of one member of the Commission"); *Microwave Communications, Inc. v. FCC*, 515 F.2d 385, 390 (D.C. Cir. 1974) (press releases not Commission action); Jason Oxman, *The FCC and the Unregulation of the Internet*, FCC Office of Plans & Policy Working Paper No. 31, at 1 (July 1999) (available at <www.fcc.gov/Bureaus/OPP>) ("The views expressed in the paper are those of the author, and do not necessarily represent the views of the Federal Communications Commission.").

The Commission has declined requests to determine the regulatory status of Cable Internet Service in no fewer than *eight* separate orders issued from 1998 to 2001. *See In re Applications for Consent to Transfer Control of Time Warner and AOL to AOL Time Warner*, CS Docket No. 00-30, ¶ 58 (2001); *In re Inquiry Concerning Deployment of Advanced Services*, Second Report, CC Docket No. 98-146, ¶ 29 n.36 (2000); *In re Applications for Consent to Transfer Control of MediaOne to AT&T*, 15 FCC Rcd 9816, ¶ 126 (2000); *In re Deployment of Wireline Services Offering*, Third Report and Order, 14 FCC Rcd 20,912, ¶ 59 (1999); *In re Applications for Consent to Transfer Control of TCI to AT&T*, 14 FCC Rcd 3160, ¶ 83 (1999); *In re Inquiry Concerning Deployment of Advanced Services*, Report, 14 FCC Rcd 2398, ¶ 24 (1999); *In re Federal-State Joint Board on Universal Service*, FCC Report to Congress, 13 FCC Rcd 11,501, ¶ 69 n.140 (1998); *In re Implementation of Section 703(e) of the Telecommunications Act*

of 1996, 13 FCC Rcd 6777, ¶ 34 (1998). Thus, in *City of Portland*, the Ninth Circuit recognized that the FCC "has declined . . . in its regulatory capacity . . . to address" the classification of Cable Internet Service under the Communications Act. 216 F.3d at 876.

Engaging in a *de novo* interpretation of the Act, the Ninth Circuit held that the "principle of telecommunications common carriage governs cable broadband as it does other means of Internet transmission." *Id.* at 879. Once a service is defined as a "telecommunications service," common carrier obligations apply to that service by automatic force of the Communications Act. *See, e.g.*, 47 U.S.C. §§ 153(44), 201(a) & 202(a). The only way for the FCC to suspend those obligations is to exercise the forbearance authority granted to it by section 10 of the Act. *See id.* § 160.

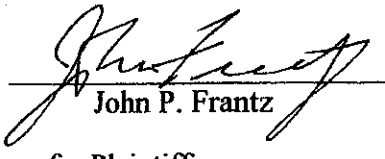
Congress authorized the Commission to forbear from regulating a telecommunications service only if the FCC determines, on the record in a proceeding subject to judicial review, that:

> (1) enforcement of such regulation . . . is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that . . . telecommunications service are just and reasonable and not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such regulation . . . is not necessary for the protection of consumers; and
>
> (3) forbearance from applying such . . . regulation is consistent with the public interest.

Id. § 160(a). The Commission has not even commenced, let alone concluded, a proceeding that addresses the application of these factors to Cable Internet Service. The Commission has therefore not taken *any* of the steps required by the Act for it to "consciously chose to grant Cable Internet Service providers freedom from common carrier regulations."

DATED: December 17, 2001

VERIZON COMMUNICATIONS

By: 
John P. Frantz

Attorneys for Plaintiff

PROOF OF SERVICE

I am employed in the County of Arlington, State of Virginia. I am over the age of 18 and not a party to the within action. My business address is 1515 North Courthouse Road, Suite 500, Arlington, Virginia 22201.

On December 17, 2001, I served the foregoing document described as PLAINTIFF GTE.NET LLC d/b/a VERIZON INTERNET SOLUTIONS' RESPONSES TO DEFENDANT COXCOM, INC.'S FIRST SET OF REQUESTS FOR ADMISSIONS on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Richard R. Patch
Susan K. Jamison, Esq.
Coblentz, Patch, Duffy & Bass, LLP
222 Kearny Street, 7th Floor
San Francisco, CA 94108
(service by first class mail)

David Mills
Dow, Lohnes & Albertson, PLLC
1200 New Hampshire Ave., N.W.
Suite 800
Washington, D.C. 20036-6802
(service by hand)

Executed on December 17, 2001, at Arlington, Virginia.

John P. Frantz

RICHARD R. PATCH (State Bar # 088049)
SUSAN K. JAMISON (State Bar # 131867)
KEITH EVANS-ORVILLE (State Bar # 171036)
COBLENTZ, PATCH, DUFFY & BASS, LLP
222 Kearny Street, 7th Floor
San Francisco, California 94108-4510
Telephone: (415) 391-4800
Facsimile: (415) 989-1663

DAVID E. MILLS (Pro Hac Vice)
BARBARA S. ESBIN (Pro Hac Vice)
MICHAEL J. STAWASZ (Pro Hac Vice)
DOW, LOHNES & ALBERTSON, PLLC
1200 New Hampshire Avenue, N.W., Suite 800
Washington, D.C. 20036-6802
Telephone: (202) 776-2000
Facsimile: (202) 776-2222

Attorneys for Defendant CoxCom, Inc.

ORIGINAL

COBLENTZ, PATCH, DUFFY & BASS, LLP
222 KEARNY STREET, 7TH FLOOR, SAN FRANCISCO, CA 94108-4510
(415) 391-4800 • FAX (415) 989-1663

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

GTE.NET LLC d/b/a VERIZON INTERNET SOLUTIONS and VERIZON SELECT SERVICES INC.,

Plaintiffs,

vs.

COX COMMUNICATIONS, INC. and COXCOM, INC.,

Defendants.

Case No. 00-CV-2289-J (BEN)

COXCOM, INC.'S REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS OR STAY ON PRIMARY JURISDICTION GROUNDS

Date: February 20, 2001
Time: 10:30 a.m.
Dept.: 12
Judge: Hon. Napoleon A. Jones, Jr.

COBLENTZ, PATCH, DUFFY & BASS, LLP
222 KEARNY STREET, 7TH FLOOR, SAN FRANCISCO, CA 94108-4510
(415) 391-4800 • FAX (415) 989-1663

I. INTRODUCTION

Fundamentally, this suit is another effort by competitors to force "open access" on cable operators' high-speed platform, even as the FCC is addressing the genuine uncertainty concerning whether and how to regulate cable Internet service. Congress delegated the authority to the FCC to create a record and establish the rules in this complex and important area of technology, and there can be no doubt that the results of the current NOI will provide an invaluable record and critical guidance on these issues for the Court and the parties here. Plaintiffs' argument that their requests, defendants' duties, and the Court's tasks are clear and simple in this case -- and that the FCC has no useful role -- is a distortion of reality.

Plaintiffs attempt to by-pass the FCC by grossly oversimplifying their claims, misconstruing AT&T Corp. v. City of Portland, 216 F.3d 871 (9th Cir. 2000), and badly misrepresenting CoxCom's response to Portland. Plaintiffs' entire case flows from the faulty premise that the Court lacks authority to defer to the FCC because Portland controls the outcome here. This is wrong for at least three reasons. First, the service plaintiffs seek in this lawsuit is not the same service discussed in Portland. The "telecommunications service" as labeled by the Ninth Circuit was a "transmission component" provided to residential end users, whereas plaintiffs here seek a commercial service for use by their ISP. These are different services as a matter of fact and law, and Portland therefore provides no legal basis for their claims. Second, Portland is distinguishable as a matter of fact. CoxCom does not provide to residential subscribers the separate "transport" service the Ninth Circuit identified, even if plaintiffs were seeking that service. And third, the discussion in Portland of a "telecommunications service" component was dicta. Resolving that issue was entirely unnecessary, because the ordinance by its own terms only applied so long as the service was classified as a "cable service."

But even if Portland did apply here, deferral to the FCC still would be required because, as plaintiffs admit, "all claims brought under the Act require a determination of reasonableness." (Pl. Opp. at 21.) Although plaintiffs try to minimize their claims for purposes of this motion, the amended complaint seeks far more than a simple declaration that Portland applies and defendants

must "begin negotiations." In fact, plaintiffs seek a ruling that defendants are common carriers as to certain alleged "telecommunications services," which would require them to provide "open access" to all ISPs. Plaintiffs also seek a ruling of liability and unspecified damages; an injunction to require service and interconnection on unspecified terms; the invalidation of a third party contract; and other relief. None of this could be granted without first determining whether plaintiffs' requests and defendants' conduct was "reasonable" considering all the facts and circumstances, including the nature, scope and scale of the requests; the technical feasibility of providing the requested service; the need for agency guidance and many other factors.

Deferral to the FCC on the complex and uncertain issues presented here would be appropriate even without an on-going agency proceeding. But it is particularly appropriate where, as here, the agency is actively considering the very issues necessary to grant the relief requested. The Court and parties would benefit greatly not only from the FCC's substantial record on the issues, but also from its guidance and clarification of what requests and obligations would be reasonable under the circumstances considering the limitations on cable technology. Certainly, Portland did not resolve the issues plaintiffs must prove to obtain the relief they seek.[1]

II. ARGUMENT

A. Plaintiffs Misconstrue Portland, Which Neither Constrains The Court From Deferring To The FCC Nor Dictates The Outcome In This Case.

Plaintiffs' argument that the Court lacks authority to defer to the FCC because Portland controls the outcome of all their claims is flawed for several reasons. First, the alleged "telecommunications service" plaintiffs seek in this case is not the same service identified in

[1] Plaintiffs wrongly accuse defendants of "evading" responsibilities and enhancing profits by not paying cable franchise fees. As plaintiffs well know, cable operators collect "cable service" franchise fees and pay them over to local franchising authorities, as their franchising agreements require. This revenue-neutral process does not "enhance profits." Moreover, the letters plaintiffs cite plainly state that the decision to stop collecting such fees on cable Internet service to subscribers in this Circuit was based (in part) on the decision in Portland that the service is not a "cable service." For this reason, plaintiffs are also wrong that judicial estoppel applies here. Defendants never argued or relied on any finding that such services (or any component of such services) are "telecommunications services."

COBLENTZ, PATCH, DUFFY & BASS, LLP
222 KEARNY STREET, 7TH FLOOR, SAN FRANCISCO, CA 94108-4510
(415) 391-4800 • FAX (415) 989-1663

Portland. The Portland decision is clear that, to the extent the court identified a "transmission component" that was a "telecommunications service," it was a service provided to end-user subscribers. 216 F.3d at 878 ("[T]o the extent that @Home provides its subscribers Internet transmission . . . it is providing a telecommunications service . . . .") (emphasis added); id. (Excite@Home provides telecommunications "to the extent [it] provides its subscribers Internet transmission over its cable broadband facilities") (emphasis added). The Portland decision does not analyze the nature of any other element of the cable Internet service and does not discuss the provision of any service from a cable operator to Excite@Home.

The "transmission component" as discussed in Portland (whether part of an integrated service or not) has specific characteristics, including asymmetrical transmission speeds (approximately one-tenth as fast for traffic originating from the subscriber as for traffic the subscriber receives); a defined transmission path (according to Portland, "all of the transmission facilities between its subscribers and the Internet," 216 F.3d at 878); and specific limitations on how the subscriber can use the service. These limitations make the end-user service unsuitable for an ISP that wishes to provide Internet access to its own subscribers. (Knight Decl. at ¶ 5-6.)

Verizon ISP clearly does not seek to purchase the end-user service described in Portland, but rather seeks to operate its own ISP Verizon ISP seeks to purchase "service from our customers' premises to our points of presence" in order "to compete with CoxCom's affiliated ISP, Excite@Home." (Am. Compl. at ¶ 3, Ex. A at 2.) But Cox@Home subscribers are expressly prohibited from using the service to operate their own ISPs. Moreover, in order to offer ISP service to CoxCom's subscribers, Verizon ISP would need greater two-way transmission speeds than currently provided and would have to operate its own servers and routers, which also is not permitted as part of the service CoxCom offers to the public. (See Knight Decl. at ¶¶ 5-6 (describing limitations in Cox@Home subscriber agreements).)

The distinction between end-user Internet access and ISP "services" is critical, because even a common carrier is not required to provide a telecommunications service it does not already

COBLENTZ, PATCH, DUFFY & BASS, LLP
222 KEARNY STREET, 7TH FLOOR, SAN FRANCISCO, CA 94108-4510
(415) 391-4800 • FAX (415) 989-1663

provide based merely on a request for such service.[2] And CoxCom cannot be required to provide separately only one element of a telecommunications service, because "unbundling" requirements apply only to ILECs.[3] Whatever CoxCom might "provide" to Excite@Home that Verizon ISP wants, it is not discussed in Portland; the Ninth Circuit certainly did not find that AT&T provided a "telecommunications service" to Excite@Home.[4] Portland therefore supplies no basis whatsoever for an obligation to treat any alleged service from CoxCom to Excite@Home as a "telecommunications service" that must now be provided to plaintiffs.

Second, even if plaintiffs claim they have requested the residential end-user service discussed in Portland, that case still does not and cannot control the outcome here. Plaintiffs' conclusory allegation that CoxCom's service is the same as the service discussed in Portland is legally insufficient to render the decision "binding" on CoxCom. See A&A Concrete, Inc. v. White Mountain Apache Tribe, 781 F.2d 1411, 1417-18 (9th Cir. 1986). Plaintiffs are wrong that CoxCom merely disputes the legal interpretation of the facts. CoxCom disputes that it provides a separate broadband transport or "pipeline" service to subscribers, which the Court in Portland must have found.[5] CoxCom provides with Excite@Home a jointly-created and jointly-owned,

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[2] See Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC, 525 F.2d 630, 641, 642 (D.C. Cir. 1976), ("NARUC I"). Even Verizon admits that, in order for a cable Internet service provider to provide "open access," the operator would have to modify its existing plant, software and traffic (routing) policies. See Verizon Comments at 30.

[3] See In re Implementation of Local Competition Provisions, First Report and Order ("First Local Competition Order"), 11 F.C.C.R. 15499, 16109 (1996); 47 C.F.R. §51.223. Only the FCC can determine whether a carrier should be classified as an ILEC. 47 U.S.C. § 251(h)(2).

[4] Moreover, to the extent Verizon ISP seeks the same arrangement CoxCom has with Excite@Home (see Am. Compl. at ¶¶ 46-50) that is a private arrangement (not offered to the public) involving the joint provision of the integrated, co-branded Internet service to end users. (Knight Decl. at ¶ 3.) The decision in Portland does not purport to address this contractual arrangement, and the Ninth Circuit certainly did not invalidate it. Indeed, as a private arrangement, it is not subject to common carrier obligations of Title II of the Act. See NARUC I, 525 F.2d at 641 (citing Semon v. Royal Indem. Co., 279 F.2d 737, 739-40 (5th Cir. 1960)).

[5] The Court must have assumed or implicitly found that the transport service there was separately provided, because under FCC rules, a separate component of an integrated service (such as the "telecommunications" component of an information service) would not be teased out of the integrated service and subjected to regulation as a "telecommunications service." In the Matter of Federal-State Joint Board on Universal Service, Report to Congress, CC Docket No. 96-45, FCC

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COBLENTZ, PATCH, DUFFY & BASS, LLP
222 KEARNY STREET, 7TH FLOOR, SAN FRANCISCO, CA 94108-4510
(415) 391-4800 • FAX (415) 989-1663

integrated, co-branded service to subscribers on specific terms and conditions. (Knight Decl. at ¶ 3-6.) In fact, Excite@Home owns and operates part of the facilities used for this service. Excite@Home Comments at 5-10 (RJN, Ex. C). Thus, even if Portland were applicable, it would not foreclose the development of the relevant facts in this case.

Third (although the Court need not reach this issue), the discussion in Portland upon which plaintiffs rely is non-binding dicta. Plaintiffs fail to address seriously whether the discussion of a "telecommunications service" was necessary to the decision, pointing instead to language indicating that the Ninth Circuit felt compelled to rule on the issue. (Pl. Opp. at 15.) But whether an analysis is dicta does not depend on how it was labeled, but rather on whether it was "necessary to the decision."[6] The ordinance involved in Portland, by its own terms, applied only if the service were deemed to be a "cable service" under Title VI of the Act. 216 F.3d at 875. Once the Ninth Circuit held in the first part of its decision that the service was not a "cable service," id. at 877, the ordinance by its own terms no longer applied and there was no further dispute to be resolved. The subsequent analysis discussing a "component" of AT&T's cable Internet service as a "telecommunications service" was simply unnecessary to the decision.

B. Even If Portland Were Applicable, Deferral To FCC Still Would Be Proper.

Plaintiffs do not dispute that the FCC is the expert agency with authority from Congress to establish a badly-needed, uniform framework for the treatment of cable high-speed Internet service. Instead, plaintiffs argue that the Court has no authority to defer to the FCC, because the

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98-67 (rel. Apr. 10, 1998) (RJN, Exhibit F). Even Verizon agrees that the mere use of "telecommunications" in the provision of an information service "does not (and cannot) transform the information service into a telecommunications service." Verizon Comments in Non-Accounting Remand Proceeding at 1-2 (Exhibit A to Supplemental Request For Judicial Notice filed herewith).

[6] Export Group v. Reef Indus., Inc., 54 F.3d 1466, 1472 (9th Cir. 1995) (Although statements in an earlier opinion suggested the statutory interpretation, "these statements were not necessary to the decision and thus have no binding or precedential impact in the present case."); see Cherry v. Steiner, 716 F.2d 687, 691 (9th Cir. 1983) (court must look behind what previous court said to determine what actually was necessary to decision versus what was obiter dictum).

COBLENTZ, PATCH, DUFFY & BASS, LLP
222 KEARNY STREET, 7TH FLOOR, SAN FRANCISCO, CA 94108-4510
(415) 391-4800 • FAX (415) 989-1663

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COX ENTERPRISES, INC.

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1225 Nineteenth Street, N.W., Suite 450 Washington, D.C. 20036 (202) 296-4933
Internet: alexandra.wilson@cox.com

Alexandra M. Wilson
Chief Policy Counsel

August 15, 2001

VIA HAND DELIVERY

W. Kenneth Ferree, Esq.
Chief, Cable Services Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: GN Docket No. 00-185 – Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities

Dear Mr. Ferree:

Cox Communications, Inc. ("Cox") respectfully submits this letter to address several issues you raised during our recent meeting to discuss Cox's comments in the above-referenced proceeding concerning the regulatory classification and treatment of cable modem and other broadband services. As discussed below, the regulatory classification of these services does not depend on the facilities used by the provider, but on the nature of the service offered to the public. While "telecommunications service," "information service" and "cable service" all may utilize "telecommunications," for a service to qualify as a "telecommunications service," the telecommunications must be not merely an input for the service, but the very service that is offered "for a fee directly to the public."[1] Cable modem service providers are not offering a pure transmission path for a fee directly to the public. Rather, cable modem service integrates high-speed Internet access, content, information and services, qualifying it as an "information service." Moreover, because cable modem service provides "programming" (i.e., "information that a cable operator makes available to all subscribers generally") and "subscriber interaction . . . for the selection or use of such" programming, the service also fits the definition of a "cable service."[2] Accordingly, under the Communications Act's definitions, cable modem service is not a telecommunications service, but an information service and a cable service.

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[1] 47 U.S.C. § 153(46).

[2] 47 U.S.C. § 522(6), (14).

A. Cable Modem Service Is Not a Telecommunications Service Because It Is Not an Offering of Pure Data Transmission for a Fee Directly to the Public.

The Communications Act regulates providers by reference to the nature of the services they offer, not the facilities they use. Because regulatory obligations do not attach to "telecommunications facilities" but to "telecommunications services," the Commission need not even concern itself with whether a cable network may be a "telecommunications facility" under certain circumstances. Such a reference is relevant only to the enforcement of Section 541(b)(3)(D), which provides that "a franchising authority may not require a cable operator to provide any telecommunications service or facilities . . . as a condition of . . . a transfer of a franchise."[3] In applying Section 541(b)(3)(D) to an "open access" local ordinance, a court need not decide whether the cable modem service offered by the cable operator to the public constitutes a "telecommunications service." Rather, the local ordinance is invalid if the court finds that the requirement for the cable operator to provide its cable system to multiple Internet service providers ("ISPs") – thereby limiting the operator's role solely to providing a facility for the transmission of information of the ISPs' choosing – constitutes a requirement that the cable operator provide "telecommunications facilities."

This was precisely the narrow ruling of the Fourth Circuit Court of Appeals in *MediaOne Group, Inc. v. County of Henrico*.[4] The Court in that case explained that, "[b]ecause the open access condition violates § 541(b)(3)(D) of the Communications Act, our analysis of federal law may stop at that [rather than] go[ing] further [to] determine the specific regulatory classification of" the cable modem service.[5] The Court expressly intended that its "telecommunications facilities" holding would leave entirely open the regulatory classification of the operator's cable modem service. This determination reflects a recognition that, as the Commission explained in its amicus brief to the Court, "not every use of telecommunications facilities necessarily involves the provision of a 'telecommunications service' under the Act's specialized definition of that term."[6]

Section 153(43) of the Communications Act defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[7] The use of "telecommunications" is necessary to all services that require the transport of information electronically from Point A to Point B.[8] Consequently, a finding that the cable operator uses

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3 47 U.S.C. § 541(b)(3)(D) (emphasis added).

4 21 U.S. App. Lexis 15540, No. 00-1680 (4th Cir. July 11, 2001) ("*MediaOne*").

5 *Id.*, slip op. at 15.

6 FCC Amicus Brief in *MediaOne*, at 21.

7 47 U.S.C. § 153(43).

8 One could argue that even traditional video and radio programming offered by cable operators, satellites, television and radio broadcasters utilize telecommunications, because

"telecommunications" or even "telecommunications facilities" to provide cable modem service would not and does not determine whether the service is classified as a telecommunications service subject to Title II regulation, an information service under Title I, or a cable service under Title VI.[9]

Section 153(46) of the Communications Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such class of users as to be effectively available directly to the public, regardless of the facilities used."[10] Thus, the Act defines "telecommunications service" by reference to the availability of the transmission path as a separate, commercial offering to the public from the service provider.[11] As the Commission explained in the Stevens Report to Congress:

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they involve the transmission of information between or among points specified by the service provider as the user of the transmission capability.

[9] Although Congress did not define the term "telecommunications facility" in the Act, it has used the phrase in provisions other than Section 541(b)(3)(D) to refer to the physical plant and equipment used to transmit services that are not common carrier in nature. For example, Section 397(13), which relates to the public broadcasting service, defines "public telecommunications facilities" as "apparatus necessary for production, interconnection, captioning, broadcast, or other distribution of programming, including but not limited to studio equipment, cameras, microphones, [etc.] . . . ." 47 U.S.C. § 397(13). Yet, broadcast services, like cable services, are defined by statute not to be common carrier services. *See* 47 U.S.C. § 153(10) ("a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier"); 47 U.S.C. § 541(c) ("Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service."). Clearly, therefore, the use of "telecommunications facilities" does not render the service provider a common carrier under the Communications Act.

Likewise, the possible use of the cable platform as a "telecommunications facility" would not take it outside of the definition of a "cable system." Section 522(7) defines a "cable system" as "a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community." 47 U.S.C. § 522(7) (emphasis added). Congress thus defines a "cable system" by reference to the inclusion of video programming service, not by reference to the exclusion of other uses of the system such as its possible use as a "telecommunications facility." Indeed, only the facilities of common carriers – i.e., carriers offering telecommunications services, not simply using telecommunications – are expressly exempted from the cable system definition (except to the extent they are used for the transmission of video programming directly to subscribers). *Id.*

[10] 47 U.S.C. § 153(46) (emphasis added).

[11] *See, e.g., Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, Order on Remand, CC Docket No. 96-149, FCC

> This functional approach is consistent with Congress' direction that the classification of a provider should not depend on the type of facilities used. . . . Its classification depends rather on the nature of the service being offered to customers. Stated another way, if the user can receive nothing more than pure transmission, the service is a telecommunications service. If the user can receive enhanced functionality, such as manipulation of information and interaction with stored data, the service is an information service.[12]

The Commission also recently reiterated in the Non-Accounting Safeguards Order that "simply using telecommunications as a means of providing an information service to end users" "does not have the effect of imposing common carrier obligations on information service providers."[13]

Application of this standard to cable modem service makes clear that the service is not a telecommunications service. Focusing on Cox's cable modem service as an example,[14] Cox does not offer pure data transmission for a fee directly to the public. Rather, while Cox may use telecommunications as an input, it offers a cable modem service to the public that integrates high-speed Internet access, content, information and services.[15] Like other ISPs such as

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01-140, at ¶ 18 (rel. Apr. 27, 2001) ("Non-Accounting Safeguards Order") ("Unlike the terms 'telecommunications service' and 'information service,' both of which are defined by reference to the act of 'offering,' the Act defines the term 'interLATA service' more broadly, without reference to its availability as a separate offering.").

[12] *In the Matter of Federal-State Joint Board on Universal Service*, Report to Congress, 13 F.C.C.R. 11501, at ¶ 59 (1998) ("Stevens Report to Congress") (footnote omitted); *see also id.* ¶ 39 (Only "an entity offering a simple, transparent transmission path, without the capability of providing enhanced functionality, offers 'telecommunications.'").

[13] Non-Accounting Safeguards Order ¶¶ 32-41. In contrast, a provider who does offer a telecommunications service as a separate offering (e.g., voice-grade telephone service or frame relay service) does not cease to be a telecommunications service provider when it bundles that service with an information service in a second offering (e.g., offering bundled voice-grade telephone service and Internet service for a single price). *See In the Matter of Federal-State Joint Board on Universal Service,* Fourth Order on Reconsideration, 13 F.C.C.R. 2372, 13 F.C.C.R. 5318, at ¶ 282 n. 827 (1997); *Independent Data Communications Manufacturers Association, Inc. and AT&T Petition for Declaratory Ruling That All IXCs be Subject to the Commission's Decisions on the IDCMA Petition*, 10 F.C.C.R. 13717, at ¶¶ 19, 40, 46 (1995).

[14] These services are offered primarily by Cox's subsidiary CoxCom, Inc. We refer to the service here as a "Cox" service solely for ease of reference.

[15] In order to enable the subscriber to connect to the Internet and interact with World Wide Web content and other users, Cox must perform enhanced functions, including protocol conversion and protocol processing, assigning the user's cable modem and computer their IP addresses, making the user's computer visible to the Internet, providing domain name

Earthlink, Cox's cable modem service provides subscribers with a variety of enhanced functions including subscriber browsing and retrieval of files from the World Wide Web, access to other Internet service providers through the Web, use of electronic mail, and access to and interaction with online newsgroups. In addition, like AOL or Yahoo, the Cox cable modem service provides the subscriber with content such as news, weather reports, advertising and games on its welcome page. Cox also provides the subscriber with the ability to customize his or her welcome page by selecting from an array of content provided by Cox's service and the ability to create "homepages" using the web hosting facilities of the service's computer servers. In short, the subscriber receives from Cox all of the enhanced functionality offered by other ISPs, already determined by the Commission to be "information services,"[16] plus additional services and content. Because the subscriber gets far more than a pure transmission path, cable modem service is not a telecommunications service, but an information service and a cable service.

B. A Cable Operator's Use of Its Own Facilities to Provide Cable Modem Service Does Not Convert This Information Service Into a Telecommunications Service.

Section 153(20) defines "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications . . .."[17] The Commission has recognized that this statutory definition embodies Congress's intent not to tease out the telecommunications component of the service for regulation as a "telecommunications service." As the Commission stated in the Stevens Report to Congress, "[b]ecause information services are offered 'via telecommunications,' they necessarily require a transmission component in order for users to access information."[18] The Commission further explained that:

> The provision of Internet access service involves data transport elements: an Internet access provider must enable the movement of information between customers' own computers and the distant computers with which those customers seek to interact. But the provision of Internet access service crucially involves information-processing elements as well; it offers end users information-service capabilities inextricably intertwined with data transport. As such, we conclude that it is appropriately classed as an "information service."[19]

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resolution, and providing authentication, security and encryption of information to protect individual users' privacy on the shared cable network.

[16] Stevens Report to Congress ¶¶ 73-82.

[17] 47 U.S.C. § 153(20) (emphasis added).

[18] Stevens Report to Congress ¶ 57.

[19] *Id.* ¶ 80 (footnotes omitted); *see also id.* ¶ 81 (Internet access services "conjoin the data transport with data processing, information provision, and other computer-mediated offerings, thereby creating an information service.").

Accordingly, the cable modem service's data transport component cannot be separated from its information-processing components and treated as a "telecommunications service" as though the cable operator were offering it separately to the public for a fee.

The cable operator's use of its own facilities to provide the service does not change this conclusion. As the Commission reasoned in the Stevens Report to Congress:

> When the information service provider owns the underlying facilities, it appears that it should itself be treated as providing the underlying telecommunications. That conclusion, however, speaks to the relationship between the facilities owner and the information service provider (in some cases, the same entity); it does not affect the relationship between the information service provider and its subscribers.[20]

The Commission thus implicitly recognized that a service provider's "furnishing of raw transmission capacity to itself"[21] as an integral element of its Internet services sold to the public cannot be equated with the offering of telecommunications "for a fee directly to the public." Such a facilities-based service provider is a user of telecommunications rather than a provider of telecommunications service to the public. In short, the cable operator's self-provisioning of the telecommunications input within its integrated offering of Internet services and content to consumers cannot be equated with the offering of telecommunications "for a fee directly to the public."

C. Cable Modem Service Also Is a "Cable Service," Because It Offers Programming and Subscriber Interaction for the Selection and Use of Such Programming.

Section 522(6) of the Communications Act defines "cable service" as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service."[22] Section 522(14) further defines "other programming service" as "information that a cable operator makes available to all subscribers generally."[23] As the drafters of the Cable Act of 1984 explained, the definition of "other programming services" includes online computer services that provide information that is accessible by all subscribers generally.[24] They further emphasized that the definition of cable services did not "restrict the manner in which cable operators may obtain the information

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[20] *Id.* ¶ 69 n. 138 (emphasis added).

[21] *Id.* ¶ 55.

[22] 47 U.S.C. § 522(6).

[23] 47 U.S.C. § 522(14).

[24] H.R. Rep. 98-934, at 41-42 (1984) ("1984 Conference Report").

provided as a cable service."[25] The information cable operators make available to all subscribers of the cable modem service generally includes information provided through the service's welcome page and subsequent screens, its connections with other Internet websites and portals, and its "cache" computer servers. This information constitutes "other programming service" under the "cable service" definition.

The legislative history accompanying the amendment of the "cable service" definition in the 1996 Act explains that the addition of the term "or use" to the existing description of the subscriber interaction required for the selection of programming, is "intend[ed] . . . to reflect the evolution of cable to include interactive services such as game channels and information services made available to subscribers by the cable operator, as well as enhanced services."[26] The inclusion of the element of subscriber "use of" programming – in addition to "one-way transmission to subscribers" of programming and subscriber "selection of" programming – reflects Congress's recognition that "cable services" would include upstream transmissions from subscribers and subscriber manipulation of data and related programming offerings. The cable modem service's provision of "programming" and a capability for subscribers to select and to manipulate this data and related programming offerings qualifies the service as a "cable service" under the Communications Act.

D. Classification of Cable Modem Service as an Information Service and/or Cable Service Best Satisfies the Commission's Policy Objectives.

Besides being dictated by the relevant statutory language and Commission pronouncements, recognition of the dual classification of cable modem service as an information service and a cable service accomplishes the Commission's three primary objectives in this proceeding. First, dual classification enables the Commission to refrain from regulating cable operator's Internet services under current competitive market conditions, in which there is no evidence of market failure. Indeed, as the Commission just reported, competition for broadband services continues to grow at an impressive rate.[27] Second, dual classification permits the

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[25] *Id.* at 41.

[26] H.R. Conf. Rep. No. 104-458, at 169 (1996) (emphasis added), reprinted in 1996 U.S.C.C.A.N. 124, 182 ("1996 Conference Report"). Accordingly, while "the categories of 'telecommunications service' and 'information service' in the 1996 Act are mutually exclusive," (Stevens Report to Congress ¶ 39), the categories of "information service" and "cable service" are not. This conclusion is reflected not only in the 1996 Conference Report, but also in the definition of information services, which broadly encompasses all forms of stored or generated content.

[27] The Commission's summary statistics of its latest data on the deployment of high-speed services in the United States, released on August 9, 2001, reveals that the rate of growth for telephone companies' residential and small business high-speed asymmetric DSL lines was over three times the rate of growth for cable modem service for the year 2000. *High-Speed Services for Internet Access: Subscribership as of December 31, 2000*, FCC Common Carrier Bureau, Table 3 (rel. Aug. 9, 2001)(The rate of growth for residential and small

We hope that the foregoing discussion will facilitate the Commission's analysis. Please do not hesitate to contact us if we can provide you with additional information.

Respectfully submitted,

Sandy Wilson
COX COMMUNICATIONS, INC.

David E. Mills
To-Quyen T. Truong
Dow, Lohnes & Albertson, PLLC
1200 New Hampshire Ave., N.W.
Suite 800
Washington, D.C. 20036
(202) 776-2000

Alexander V. Netchvolodoff
Alexandra M. Wilson
Cox Enterprises, Inc.
1225 19th Street, N.W.
Suite 450
Washington, D.C. 20036
(202) 296-4933

cc: Marjorie Greene, Esq.
Sarah Whitesell, Esq.
John Norton, Esq.
Royce Sherlock, Esq.